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Supreme Court of the United States

OCTOBER TERM, 1967

No. 1054

THE PORT AUTHORITY TRANS-HUDSON CORPORATION,

Petitioner,

v.

HUDSON RAPID TUBES CORPORATION, a corporation of the State of Delaware,

Respondent.

BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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BRIEF FOR THE STATE OF NEW JERSEY, *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Statement

The Attorney General of the State of New Jersey submits this brief on behalf of the State appearing as *amicus curiae* in support of the petition of the Port Authority Trans-Hudson Corporation that a writ of certiorari be issued to review the judgment of the Court of Appeals of the State of New York, entered on October 31, 1967 and reported at 20 N. Y. 2d 457, 231 N. E. 2d 734.

New Jersey is filing this brief to protect its rights under two provisions of a Compact which it has entered into with New York.[1] The Compact directed the Port of New York Authority, a joint agency of both States (either acting directly or through a wholly-owned subsidiary) to acquire for continued operation a severely deteriorated, hopelessly unprofitable interstate commuter railroad, 65% of which is located in New Jersey. At the time the Compact was executed, the railroad (then known as the Hudson Tubes) was on the verge of abandonment by its private owner who had eagerly sought public acquisition. The Compact specified that in valuing the railroad, the "courts of the forum state [New York] shall apply the laws of valuation of the other state [New Jersey] . . . to the valuation of the property which is located . . . in the non-forum state." It also provided that the condemnee "shall not be awarded . . . any increment above the just compensation required by the Constitutions of the United States and of the state or states in which the property is located . . . by reason of any circumstances whatsoever."

Despite these provisions, the New York Court of Appeals (a) *expressly* refused to follow New Jersey condemnation law in valuing that portion of the railroad located in New Jersey and (b) based its condemnation award for the entire railroad upon the alleged gain to the taker resulting from the condemnation even though every decision of the New Jersey courts (under the New Jersey Constitution),

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[1] Ch. 8, Laws of N. J., 1962; Ch. 209, Laws of N. Y., 1962. This legislation constitutes an agreement between the states amendatory of and supplemental to the Port Compact and comprehensive plan legislation, Ch. 151, Laws of N. J., 1921; Ch. 154, Laws of N. Y., 1921; Ch. 9, Laws of N. J., 1922; Ch. 43, Laws of N. Y., 1922; consented to by Congress, 42 Stat. 174 (1921); 42 Stat. 822 (1922). The constitutionality of the 1962 legislation was upheld in *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 N. Y. 2d 379, *appeal dismissed for want of a substantial Federal question*, 375 U. S. 78, *rehearing denied*, 375 U. S. 960 (1963).

every decision of this Court (under the United States Constitution) and every *prior* decision of the New York courts (under the New York Constitution), has, without any exception whatsoever, held that a condemnation award must be based solely on economic loss to the condemnee with any gain to the condemnor being irrelevant. See, e.g., *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949); *Olson* v. *United States,* 292 U. S. 246 (1934); *Shoemaker* v. *United States,* 147 U. S. 282 (1893); *Currie* v. *Waverly & N.Y.B.R. Co.,* 52 N. J. L. 381, 20 Atl. 56 (1890); *St. Agnes Cemetery* v. *State,* 3 N. Y. 2d 37 (1957).

New Jersey's interest in this matter is so substantial that in addition to this brief it has previously submitted to this Court a motion and brief urging this Court to take original jurisdiction over this controversy. (*State of New Jersey* v. *State of New York and Hudson Rapid Tubes Corporation* (No. 34, Original, filed on January 22, 1968)). New Jersey's position in the original action, like the Port Authority Trans-Hudson Corporation's position in seeking a writ of certiorari in this case, is that the judgment of the New York Court of Appeals is violative of the express terms of New Jersey's agreement with New York. A copy of New Jersey's brief in the original action is attached to this brief as an appendix. The facts of the controversy are contained therein and therefore need not be repeated here.

Similarly, New Jersey's basic legal contentions regarding the violation of its rights under its agreement with New York are likewise contained in its brief in the original action and need not be repeated.

This brief will be limited solely to showing why this controversy should, in fairness to the people of New Jersey, be reviewed by this Court.

Reasons for Granting the Writ

A writ of certiorari should be issued in the instant case because the contractual breach by the New York Court of Appeals threatens the continued usefulness of one of the most noteworthy governmental achievements of our federal system in this century—the utilization of interstate compacts to create operating agencies which are charged with the responsibility of solving regional problems that transcend individual state boundary lines. New Jersey is a party to ten of these compacts. This Court has already affirmed the existence of its duty to review by writ of certiorari a decision of the highest court of a compacting state when officials of a compact agency allege that such decision constitutes a serious violation of the interstate agreement under which their agency operates. *Dyer* v. *Sims*, 341 U. S. 22 at 28 (1951).

In addition, a writ of certiorari should be granted in the instant case because the controversy concerns a problem of federal law which is both important and current, *i.e.*, the proper standard to be utilized in valuing a hopelessly unprofitable interstate railroad which is required by public law to be continued in use. This legal issue is now in litigation in another case before a three-judge statutory court and it will most probably come before this Court for final resolution late this Spring or early next Fall.[1]

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[1] *The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 296); *The Chase Manhattan Bank* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 306); *Manufacturers Hanover Trust Company* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 308); *United States Trust Company of New York* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 344); and *Oscar Gruss & Son* v. *United States and Interstate Commerce Commission* (S. D. N. Y. 68 Civ. 345).

Moreover, the general economic plight of our railroads out of which the instant controversy arises has become increasingly a major national problem.[1] As we shall show, the decision below by creating "new and revolutionary law"[2] as to what constitutes just compensation and thereby changing "the only invariable principle of valuation in condemnation proceedings"[3] seriously jeopardizes the fulfillment of the Congressional purpose behind the federal grant-in-aid program authorized by the Urban Mass Transportation Act,—the purpose of which is to preserve the existence of essential commuter passenger facilities serving our nation's urban areas. Under that program federal funds cannot be made available "to any State or local public body" for the acquisition of privately-owned transit facilities unless "just and adequate compensation will be paid to such companies for acquisition of their franchises or property to the extent required by applicable State or local laws." 49 U.S.C. §1602(c). Excessive compensation for the acquisition of such companies could severely limit the beneficial use of public funds—Federal and local—available for the preservation of mass transit facilities.

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[1] See Transportation Act of 1958, 72 Stat. 568, 49 U.S.C. §1231-40 (1958) and Digest, Analysis and Index of Testimony of the Hearings Before a Subcommittee on Transportation and Communications of the House Committee on Interstate and Foreign Commerce, 84th Cong., 2nd Sess., (1956).

[2] Judge Burke dissenting in 20 N. Y. 2d 457, 482, 483.

[3] *Spitzer* v. *Stichman*, 278 F. 2d 402, 410 (2d Cir. 1960).

POINT I

The decision by the New York Court of Appeals must be reviewed by this Court in order to preserve the future usefulness of congressionally sanctioned interstate compacts.

In *Dyer* v. *Sims*, 341 U. S. 22, 28 (1951), this Court clearly recognized that a decision such as the one by the New York Court of Appeals in this case presents a most serious federal question:

> "To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies * * * is the function and duty of the Supreme Court of the Nation."

This Court also pointed out that:

> "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State." *Ibid.*

This Court's jurisdiction to review these questions by writ of certiorari was conclusively established in *Delaware River Joint Toll Bridge Commission* v. *Colburn*, 310 U. S. 419 (1940). There, this Court granted a writ of certiorari to review a decision by the highest court of New Jersey obligating the Bridge Commission to pay consequential damages for private property adversely affected by bridge construction. The Delaware Commission, like the Port Au-

thority, is a "body politic" created by a compact between two states consented to by Congress. The first issue in *Colburn,* pursuant to this Court's directive, was that of the Court's jurisdiction under its certiorari power. See 308 U. S. 549 (1940). A unanimous court, speaking through Justice Stone, conclusively determined this question by ruling:

> ". . . that the construction of such a compact sanctioned by Congress . . . involves a federal 'title, right, privilege or immunity' which when 'specially set up or claimed' in a state court may be reviewed here on certiorari . . ." 310 U. S. at 427.[1]

The growing importance of interstate compacts to the future of our federal system requires that certiorari be

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[1] Thus, the only qualification set out by Justice Stone was that the federal right, title, privilege or immunity must be "specially set up or claimed in a state court." The federal question in the case at bar was "specially set up or claimed" in the New York courts. Thus, it "may be reviewed here on certiorari." Petitioner specifically pointed out to the trial court that its proposed award would violate the Compact's provisions and, in each of the New York appellate courts, including the Court of Appeals, it pointed to the applicable Compact provisions and informed the court that any award for the railroad in excess of the prior owner's economic loss would violate the Compact. (These facts are detailed on pages 15 through 18 of the Port Authority Trans-Hudson Corporation's petition for certiorari.) Accordingly, the federal question now raised before this Court had been previously raised in the New York courts. The amendment which the New York Court of Appeals made to its remittitur is conclusive on this point. (See page 154-155a of the Appendix to the Petition for Certiorari filed by the Port Authority Trans-Hudson Corporation). Under these circumstances, it is clear that this Court has jurisdiction to grant the writ and construe and enforce the Compact according to its express terms.

granted in this case. A half century ago there was not a single agency in the United States created by interstate compact. The first such agency was The Port of New York Authority created by interestate compact in 1921. New Jersey is a party to ten of these compacts.[1] Interstate

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[1]*Name of Agency*	*Party States*	*Congressional Consent to Compact*
he Port of New York Authority	New York, New Jersey	42 Stat. 174 (1921)
elaware River Port Authority	New Jersey, Pennsylvania	47 Stat. 308 (1932)
nterstate Sanitation Commission	Connecticut, New Jersey, New York	49 Stat. 932 (1935)
elaware River Joint Toll Bridge Commission	New Jersey, Pennsylvania	49 Stat. 1058 (1935)
alisades Interstate Park Commission	New Jersey, New York	50 Stat. 719 (1937)
tlantic States Marine Fisheries Commission	Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia.	56 Stat. 267 (1942)
'aterfront Commission of New York Harbor	New Jersey, New York	67 Stat. 541 (1953)
i-State Transportation Commission	Connecticut, New Jersey, New York	75 Stat. 170 (1961)
elaware River Basin Commission	New York, New Jersey, Delaware, Pennsylvania, United States	75 Stat. 668 (1961)
elaware River and Bay Authority	Delaware, New Jersey	76 Stat. 560 (1962)

agencies throughout the country are currently engaged in developing transportation facilities, maintaining an interstate park, protecting against forest fires, maintaining adequate water supplies, controlling water pollution and protecting natural resources. And this is but a partial list of the present day responsibilities of compact agencies. As a committee of the National Association of Attorneys General has stated:

> " 'For the future—the growing needs and opportunities for intergovernmental cooperation probably will witness a continuing reliance on compacts, in terms of the numbers of such agreements and of the numbers of states affected, and in the variety of subjects with which they deal.' " Report of the Joint Legislative Committee on Interstate Cooperation, Vol. IV, N. Y. Legis. Doc. (1958) at p. 49.

It was pointed out by James F. Wright, Executive Director of the Delaware River Basin Commission, at the 1967 Muskie Committee Hearings on Creative Federalism that:

> "Matters once perhaps properly considered purely local in concern have become recognized as regional or national in their impact and have required expansion of policies and consideration of organizations which extend beyond state boundaries." Senate hearings before the Subcommittee on Intergovernmental Relations of the Committee on Government Operations, part 2-B, 90th Cong., 1st Sess. (1967) at p. 934.

Another commentator has recently stated:

> "the conditions which have brought about the creation of the most important interstate authorities to date are the product of increased urbanization—the result, in short, of the growth of metropolitan areas in this country. It is not mere coincidence that the

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Palisades Interstate Park Commission	New Jersey, New York	50 Stat. 719 (1937)
Atlantic States Marine Fisheries Commission	Connecticut, Delaware, Florida, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Virginia	56 Stat. 267 (1942)
Waterfront Commission of New York Harbor	New Jersey, New York	67 Stat. 541 (1953)
Tri-State Transportation Commission	Connecticut, New Jersey, New York	75 Stat. 170 (1961)
Delaware River Basin Commission	New York, New Jersey, Delaware, Pennsylvania, United States	75 Stat. 668 (1961)
Delaware River and Bay Authority	Delaware, New Jersey	76 Stat. 560 (1962)

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> "the conditions which have brought about the creation of the most important interstate authorities to date are the product of increased urbanization—the result, in short, of the growth of metropolitan areas in this country. It is not mere coincidence that the

> first interstate authority to be created in the United States was the Port of New York Authority, or that the Port of London Authority was its predecessor. Both were brought into being in order to solve problems arising in rapidly growing urban areas. The same is true of the Bi-State Development Agency and the proposed Delaware River Basin Commission. Today, the steadily and rapidly growing concentration of two-thirds of the nation's population into 192 metropolitan areas is perhaps the most dramatic event on the American scene, and unless all the prognostications about future population growth in the United States are wrong, the future holds only a tinuation of the process." Leach, "Interstate Authorities in the United States," 26 Law & Contemp. Probs. 666, 678 (1961).

If this necessary instrument of social growth in our federal system is to continue facilitating the solution to multistate problems, it is necessary that the compacts which delineate the obligations of compacting states to each other not be violated, and that this Court assume its rightful obligation as the ultimate arbiter of the relatively few controversies that might arise between the States as to the interpretation and enforcement of such compacts.

As this Court itself stated in *Dyer* v. *Sims*, 341 U. S. 22, 28 (1951):

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts."

Thus, the Supreme Court is the final arbiter of a compact's terms.

Julius Henry Cohen, the Port Authority's first general counsel, indicated in his autobiography that an authority to be effective must be based on a *binding* interstate compact.

> "It was clear that New York and New Jersey had to be brought into *binding* cooperation. Hence, there would have to be a compact between the two." Cohen, They Builded Better than They Knew, 290 (1946).

Without this Court to prevent it, a legislature or the courts of one state could unilaterally change the previously agreed upon policy of two states under a compact and not only dispose of interstate property but defeat the basic policy supporting the compact. In the case *sub judice* involving the Port of New Jersey and New York, the largest economically integrated area in the entire country serving a population of over 12,000,000 people, the New York Court of Appeals incredibly has attempted to do exactly that and unless this Court intervenes, the effect will be to inhibit the State of New Jersey from further cooperative efforts with New York under the Compact in fear of future unilateral breaches and subversion of these efforts.

In this case the judgment of the New York Court of Appeals constitutes a flagrant breach of compact, thereby subverting the basic public policy behind the action of the State of New Jersey in agreeing with the State of New York that The Port of New York Authority, their joint agency should acquire the Hudson Tubes Railroad. New Jersey's public policy is clearly set forth in the agreement with New York which provides that the portion of the Hudson Tubes Railroad physically located within New Jersey must

be valued according to New Jersey principles of valuation law, and that under no "circumstances whatsoever" shall the condemnee be awarded any "increment" above the minimum amount of just compensation required by the Constitutions of the United States, New Jersey and New York for this railroad which is physically located in both States.

In the view of your *amicus* the most casual perusal of the New York Court of Appeals opinion makes it crystal clear that the Court did not even endeavor to make a good faith attempt to perform these compact provisions. Judge Burke in his dissenting opinion was moved to characterize the decision of the New York Court as "lip service to the mandate it [the Court of Appeals] is under to determine the award for the New Jersey property here in question under the requirements of the New Jersey and Federal Constitutions." 20 N. Y. 2d 457, 481.

New Jersey believes that there exists no Constitutional requirement or countervailing reason of public policy which can in any way justify the action of the New York Court of Appeals in ignoring the express terms of the very bi-state agreement which gave it jurisdiction to value property located in both New Jersey and New York. New Jersey submits that it is vital to the future of our federal system that the integrity of interstate agreements be safeguarded. Under the facts of this case, this can only be achieved if this Court reviews the decision of the New York Court of Appeals. The Court by granting such review will show that it will scrupulously enforce the specific terms of interstate compacts and will thereby discourage states who are parties to such compacts from ignoring, as New York did here, the express terms of these compacts and will thus accord such compacts the respect to which they are entitled under the Federal Constitution.

POINT II

The vital federal interest and policy in preserving mass transit facilities will be seriously impaired if the enormous windfall award granted by the New York Court of Appeals stands unreviewed and uncorrected.

The urban America of tomorrow must today come to grips with the problem of mass transportation. Efficient and comfortable mass transit systems have become an increasingly important national concern. The grave financial problems of our railroads are now the focus of considerable public attention.

In 1964, Congress passed the Urban Mass Transportation Act to assist states, local public bodies and their agencies in the preservation of viable mass transportation systems. 49 U.S.C. §1601 *et seq.*[1] This legislation is based

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[1] As early as 1920 Congress recognized "in a general sense the broad national interest in 'adequate transportation' ". Weissman, "Railroad Abandonments: The Competitive Ideal," 43 Minn. L. Rev. 251, 254 (1958). The Transportation Act of 1920 imposed upon the Interstate Commerce Commission a basic responsibility for assuring an adequate *national* railway system. 41 Stat. 456 (1920). See *Wisconsin Commission* v. *Chicago B & Q Railroad*, 257 U. S. 563, 585 (1922). In the Transportation Act of 1940, Congress declared there was a national concern and intention to "promote safe, adequate, economical, and efficient service." 54 Stat. 898 (1940). In 1958, Congress reiterated its view that the problems of America's railroads were national and regional in scope and that the problems were incapable of being solved locally. The Act granted the Interstate Commerce Commission, when requested by the carrier, jurisdiction over the discontinuance of any train service crossing state lines and it greatly reduced state jurisdiction over wholly intrastate operations. 72 Stat. 568. Finally, in 1967, the Federal Government established the Department of Transportation to give mass transit problems a voice at the highest level.

upon Congress' recognition, recited in the act, that the welfare of the bulk of the Nation's population, which is located in rapidly expanding metropolitan areas often spanning the boundaries of State and local jurisdictions, is being undermined by a general inadequacy of transportation facilities and services. The act seeks to assist in the development of improved mass transportation facilities, equipment, techniques and methods; to encourage the planning and establishment of area-wide urban mass transportation systems needed for economical and desirable urban development; and to provide assistance to State and local governments and their instrumentalities in preserving such systems. In 1966, Congress amended its Urban Mass Transportation Act to increase the amount of federal monies available for mass transit systems. 80 Stat. 715.

It is readily apparent that the vital federal interest in the preservation of urban mass transit facilities which Congress recognized, is jeopardized by the Court of Appeals' ruling. That ruling, by changing "the only invariable principle of valuation in condemnation proceedings"[1] as to what constitutes just compensation, has a direct bearing on the utilization of federal funds available to state and local public bodies under the Urban Mass Transportation Act. That act specifies that Federal monies cannot be utilized by "any State or local public body" for the acquisition of privately-owned transit facilities "unless . . . *just and adequate compensation* will be paid to such companies for acquisition of their franchises or property *to the extent required by applicable State or local laws.*" 49 U.S.C. §1602(c). (Emphasis added.)

Application of the Urban Mass Transportation Act in the light of the decision below would result in the payment of

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[1] *Spitzer* v. *Stichman,* 278 F. 2d 402, 410 (2d Cir. 1960).

excessive compensation for the acquisition of unprofitable transit enterprises, thereby limiting the beneficial use of public funds—both Federal and local—available for the preservation of mass transit facilities.

In addition, the New York Court of Appeals' decision could well force state and local governments, because of financial reasons, to allow essential privately-owned insolvent transit facilities to grind to a halt (because of lack of funds) rather than pay the owners of such facilities sums well in excess of the economic worth of their enterprises—sums predicated solely upon the public need. Once a transit system has ceased operations because of a lack of funds, a public agency could then acquire the physical assets of the defunct facility on a liquidation basis without paying a large windfall to speculators. The public, of course, will be the loser since it will be forced to suffer the discomforts inherent in allowing a mass transit facility to run itself into the ground.

This Court is certainly familiar with the financial problems faced by the nation's commuter railroads. See *Penn-Central and N. & W. Inclusion Cases,* 36 U. S. L. W. 4093 (decided January 15, 1968.) Both the New Haven Railroad which was involved in the *Penn-Central* litigation and the Hudson Tubes Railroad which is involved in this case, provide essential passenger transportation services though both are concededly inherently incapable of profitable operation. On October 31, 1967, the New York Court of Appeals in this case valued the Hudson Tubes Railroad on the basis of its essentiality to the public, whereas two weeks later the Interstate Commerce Commission employed an entirely different standard when it valued the New Haven Railroad on a liquidation basis. The Commission held that since the New Haven Railroad was an unprofitable operation, liquidation value constituted "just and ade-

quate compensation." *Pennsylvania Railroad Co.—Merger—New York Central Railroad Co.*, I. C. C. Finance Docket No. 21989, p. 115, decided November, 1967.

Five separate groups of creditor interests are now relying upon the New York Court of Appeals' decision in this case to challenge the correctness of the Interstate Commerce Commission's valuation of the New Haven Railroad See footnote p. 4, *supra*. This challenge is being made before a three-judge statutory court. Thus, for example, in *Oscar Gruss & Son* v. *United States and Interstate Commerce Commission*, (S. D. N. Y. 68 Civ. 345) the complaint which was filed on January 25, 1968 emphasizes (p. 10) that:

> "In so holding, the Commission flatly contradicted—and apparently disregarded—the decision of the New York State Court of Appeals in Matter of Port Authority Trans-Hudson Corporation."

Similarly, in *United States Trust Co.* v. *United States and Interstate Commerce Commission*, (S. D. N. Y. 68 Civ. 344) it is urged that the Interstate Commerce Commission erred in failing

> "* * * to give any consideration in its valuation of the New Haven to reproduction cost or going concern value and in so doing completely disregarded the decision of the Court of Appeals of the State of New York *In Matter of Port Authority Trans-Hudson Corporation*, 20 N. Y. 2nd 457, 231 N. E. 2d 734 (1967)." Complaint filed January 24, 1968, p. 11.

Since an appeal from a three-judge district court comes directly here, it seems apparent that this Court will ultimately have to pass upon the correctness of the Court of Appeals' ruling in this case. In all likelihood the New

Haven matter will come before this Court either late this Spring or early next Fall. Accordingly, the decision below involves an important national issue of current urgency—an issue which New Jersey believes needs to be decided by this Court now.

POINT III

The vital interest of New Jersey in the problems of its commuters is subverted by the New York Court of Appeals decision.

The State of New Jersey has long been confronted with the problems engendered by railroads operating with overall net losses who wish to discontinue operation of passenger service and "the problems involved in regulating New Jersey's passenger railroads are representative of those encountered in other states." Thomas, "Public Utilities: Discontinuance of Railroad Service," 14 Rutgers L. Rev. 345 (1960).

By authorizing condemnation of the Hudson Tubes Railroad by the Port of New York Authority or its subsidiary, the States of New Jersey and New York found a means of preserving a much needed mass transit facility. Without such means this hopelessly unprofitable passenger-service-only railroad would, in a short period of time, have been forced to abandon operation. Such action by the railroad would have been Constitutionally permissible and could not have been prevented by the State of New Jersey. Such discontinuance would have left with major commutation problems the approximately 30 million annual New Jersey commuters who use the railroad. These problems may have remained insoluable in view of New Jersey's fiscal inability to solve them in any other meaningful way than the solution reached,—namely, condemnation under the estab-

lished New Jersey-Federal-New York valuation principle which looks to the prior owner's economic loss to determine value.

But an answer was found—the use of an interstate agency to operate an interstate commuter facility. However, after arriving at this solution the State of New Jersey should not be penalized by being forced to have its joint agency with New York pay a large windfall to the Hudson Rapid Tubes Corporation which owned this railroad for approximately 8 months prior to condemnation. The financial interests which control the Hudson Rapid Tubes Corporation are the former creditors of the railroad who wiped out its former equity owners in the reorganization proceeding. In view of New Jersey's current budget crisis our legislature may well reconsider New Jersey's position of utilizing interstate compacts for the solution of interstate transportation problems if the immense windfall award of the New York Court of Appeals is allowed to stand.

Certainly there is a vital national, as well as regional interest in the continued operation by an interstate agency of a hopelessly unprofitable interstate railroad essential to the public's welfare and the proper valuation in condemnation of such a railroad pursuant to an interstate compact raises a substantial Federal question.

New Jersey is of the firm opinion that the New York Court of Appeals' decision interpreting and enforcing the Compact between New Jersey and New York adversely affects: (a) the regional and national interest in the solution of this problem by means of an interstate compact, (b) other possible solutions to the mass transit problem under the Urban Transportation Act and (c) the solution to the numerous other urban problems currently facing New Jersey and New York as well as other states in the nation by means of congressionally sanctioned interstate compacts.

CONCLUSION

In light of the foregoing, New Jersey respectfully submits that this Court should grant a writ of certiorari in this case.

Respectfully submitted,

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Proof of Service

I, JOSEPH A. HOFFMAN, First Assistant Attorney General of the State of New Jersey and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of February, 1968, I served copies of the foregoing brief on Hudson Rapid Tubes Corporation and on Port Authority Trans-Hudson Corporation, by mailing a copy in a duly addressed envelope with first-class postage pre-paid, to each of the following in this cause:

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JOSEPH A. HOFFMAN

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. , Original

STATE OF NEW JERSEY,

Plaintiff,

v.

STATE OF NEW YORK and
HUDSON RAPID TUBES CORPORATION, a corporation of the State of Delaware,

Defendants.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

Statement

This brief is submitted by the State of New Jersey in support of its motion for leave to file a complaint against the State of New York and the Hudson Rapid Tubes Corporation, a citizen of the State of Delaware. The complaint seeks to prevent the State of New York from fur-

ther breaching New Jersey's rights under a Compact[1] between the States by enforcing a judgment in favor of the corporate defendant made by the New York courts in violation of said Compact hereafter referred to as the "Agreement".

There can be no question but that this Court possesses original jurisdiction over this suit by New Jersey against New York and a citizen of Delaware. In an identical situation, this Court granted Pennsylvania's motion for leave to file its bill of complaint against New Jersey as well as against individually-named defendants. *Pennsylvania* v. *New Jersey, et al.*, 309 U. S. 628 (1940). In that case, discussed in detail below, Pennsylvania contended that a decision by the New Jersey courts violated a compact between the States by requiring an interstate agency, contrary to the compact, to pay damages to private litigants.[2] Pennsylvania named the private litigants together with New Jersey as defendants in its original action. The basis for this Court's jurisdiction there, as it is here, is Article III of the Constitution which expressly provides that "the supreme Court shall have original Jurisdiction" "in all Cases . . . in which a State shall be Party" and that "The judicial Power of the United States" shall

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[1] Ch. 8, Laws of N. J., 1962; Ch. 209, Laws of N. Y., 1962. This legislation constitutes an agreement between the States amendatory of and supplemental to the Port Compact and Comprehensive Plan, Ch. 151, Laws of N. J., 1921; Ch. 154, Laws of N. Y., 1921; Ch. 9, Laws of N. J., 1922, Ch. 43, Laws of N. Y., 1922; consented to by Congress, Pub. Res. 17, Ch. 77, 67th Cong., 1st Sess. (1921), 42 Stat. 174; Pub. Res. 66, Ch. 277, 67th Cong., 2nd Sess. (1922), 42 Stat. 822.

[2] The case was never decided on its merits—see 310 U. S. 612—since Pennsylvania's rights under the compact were vindicated when this Court reversed the decision of the New Jersey courts in *Delaware River Toll Bridge Commission* v. *Colburn*, 310 U. S. 419 (1940).

extend "to Controversies between two or more States" as well as to those "between a State and Citizens of another State."

This brief demonstrates not only that this Court possesses original jurisdiction over this action but also that it has recognized its affirmative duty to decide controversies which, like the present one, relate to the interpretation and enforcement of interstate agreements. Further, since New Jersey has a vital independent interest in having the Agreement to which it is a party performed according to its terms, it cannot rely at this time for the protection of its rights upon a forthcoming petition for a writ of *certiorari* which will be submitted to this Court on behalf of the Port Authority Trans-Hudson Corporation (PATH), a wholly owned subsidiary of its joint agency, The Port of New York Authority.[1] In that petition this Court will be asked to review the decision of the New York Court of Appeals under the Agreement.

Specifically, New Jersey has brought this action to establish its rights under two provisions of its Agreement with New York. The Agreement between the States authorized the Port of New York Authority (acting either directly or through a wholly owned subsidiary corporation) to acquire a severely deteriorated, deficit-ridden interstate commuter railroad, 65% of which is located in New Jersey, and which was then on the verge of abandonment by its private owner who had eagerly sought public acquisition of the facility. The Agreement specified that in valuing the railroad, the "courts of the forum state [New York] shall apply the laws of valuation of the other state [New Jersey] . . . to the valuation of the

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[1] General Counsel for The Port of New York Authority, Sidney Goldstein, Esq., has notified the State that his agency will file such a petition.

property [65%] which is located . . . in the non-forum state." Additionally, the Agreement provided that the condemnee "shall not be awarded . . . any increment above the just compensation required by the Constitutions of the United States and of the state or states in which the property is located . . . by reason of any circumstances whatsoever."

Despite these provisions, the highest court of New York State *expressly* refused to follow New Jersey condemnation law in valuing that portion of the railroad located in New Jersey. The New York court based its condemnation award for the entire railroad upon the alleged gain to the taker resulting from the condemnation even though every decision of the New Jersey courts (under the New Jersey Constitution), every decision of this Court (under the United States Constitution) and every *prior* decision of the New York courts (under the New York Constitution), has, without any exception whatsoever, held that a condemnation award must be based solely on economic loss to the condemnee. Indeed, the United States Court of Appeals for the Second Circuit has said in reference to this very railroad:

> "The only invariable principle of valuation in condemnation proceedings is that the award should reflect what the owner has lost; the criterion is not what the taker has gained. Roberts v. New York City, 1935, 295 U. S. 264, 282, 55 S. Ct. 689, 79 L. Ed. 1429. In the absence of a market value, this may properly be determined by what the property 'brings in the way of earnings to its owner.' Monongahela Navigation Co. v. United States, 1893, 148 U. S. 312, 328, 13 S. Ct. 622, 627, 37 L. Ed. 463. Where the property is incapable of producing earnings, 'junk value' may be appropriate."[1]

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[1] *Spitzer* v. *Stichman*, 278 F.2d 402, 410 (2d Cir. 1960).

It is New Jersey's position in this litigation that the decision of the New York Court of Appeals violates in three crucial respects the express terms of the Agreement between the States. Primarily, it ignores the mandate of the Agreement to apply New Jersey law to that portion of the condemned railroad (65%) which is located in New Jersey. Second, it ignores the mandate of the Agreement that no "increment" above the just compensation required under the Constitutions of the United States, New Jersey and New York be paid for the railroad "by reason of any circumstances whatsoever". And third, it ignores the manifest intent of the two States that the previously well-settled rules of just compensation valuation (under the Constitutions of the United States, New Jersey and New York) be incorporated into their Agreement.

1. The long history of successful cooperation between the States of New Jersey and New York has been achieved only by the faithful performance of compact obligations by each of the two states.

The governmental problems faced by the States of New Jersey and New York in the development of the Port of New York District—the Nation's largest metropolitan region—are the direct result of the area's geography, of its tremendous concentration of population and commerce, and of its division into two States and over 200 separate local governments.

For a century, prior to 1917, the history of the region was one of unfortunate conflict between New Jersey and New York. Disputes early in the nineteenth century over harbor franchises, ferry rights and boundaries had brought the two States to the brink of war.[1] Those political and

[1] See *Gibbons* v. *Ogden*, 9 Wheat. 1, 184 (1824).

commercial rivalries were finally settled in the treaty of 1834 between New Jersey and New York.[1]

This treaty dealt solely with the technical and political questions of boundaries and territorial jurisdiction. The subsequent growth of the bi-State region, the increase in its population and its commerce, the coming of the railroad, and later of the automobile, created new social, and especially economic, problems calling for the exercise of governmental power. A railroad rate controversy between interests in New Jersey and those in New York resulted in the focal *New York Harbor* case, 47 I. C. C. 643 (1917). There the Interstate Commerce Commission emphasized that:

> "historically, geographically, and commercially New York and the industrial district in the northern part of the state of New Jersey constitute a single community." (47 I. C. C. at 739)

The Interstate Commerce Commission then stated that:

> "cooperation and initiative must eventually bring about the improvements and benefits which the complainants hope to attain through a change in the rate adjustment." (47 I. C. C. at 739)

Fortunately, before the decision in the *Harbor* case, an important constructive step had already been taken by the States to solve cooperatively the problems of their joint port. The New Jersey Legislature at the urging of Governor Walter E. Edge created a study commission to act cooperatively with a similar commission created by

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[1] Laws of N. J. 1833-34, p. 118, February 26, 1834; confirmed by Ch. 8, Laws of N. Y., 1834. This treaty was consented to by Congress on June 28, 1834, 4 Stat. 708.

New York to seek a solution to the many economic problems plaguing the Port District. As a precursor of the cooperation to come, the separate study commissions established by each State organized themselves as a single body, known as the New York, New Jersey Port and Harbor Development Commission.

The Commission rendered a massive 495-page report which urged the creation of a permanent interstate agency as the basic essential for the carrying out of a unified program of port development and improvement. Because of the governmental and political implications inherent in the proposed solution, the Commission recommended resort to the Compact Clause of the Constitution, which as Mr. Justice Brandeis has pointed out "adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations."[1] The implementing instrument to be utilized was the establisment of a regional and functioning port agency. Until this time the Compact Clause had lain dormant as a constructive governmental tool. It had been used only for the adjustment of state boundary disputes. Never before had it been employed as the springboard for a permanent operating interstate agency.

In 1921 the recommendations of the study Commission bore fruit when New Jersey and New York entered into an interstate compact which created a statutorily defined region known as the Port of New York District, an area roughly within a 25-mile radius of the Statue of Liberty, and established The Port of New York Authority, as the agency of both States, for the express purpose of developing the port district on a unified and cooperative basis. The Compact took the form of an amendment to the 1834 Treaty. It was passed by the Legislatures of both New

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[1] *Hinderlider* v. *LaPlata, R. & Cherry Creek Ditch Co.*, 304 U. S. 92, 104 (1938).

Jersey and New York and consented to by Congress.[1] In the Compact both States pledged

> "each to the other, faithful co-operation in the future planning and development of the port of New York." (Art. I)

The necessity for the creation of the new agency was well stated in the Compact, which declares that

> "a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the States of New York and New Jersey." (Preamble)

With impressive foresight the Compact pointed out that

> "The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans." (Preamble)

The Compact's preamble concluded by stating that

> "Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency." (Preamble)

The Compact went on to create The Port of New York Authority as a "body, both corporate and politic" (Art. III) as the joint agency of the States with power to effectuate the performance of the Compact. In prescient anticipation of the ever-evolving challenges to be posed

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[1] Ch. 151, Laws of N. J. 1921; Ch. 154, Laws of N. Y. 1921; Pub. Res. 17, Ch. 77, 67th Cong., 1st Sess., 1921, 42 Stat. 174.

by their bi-State port, the Compact provided that "the port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other." (Art. VII)

Pursuant to the Compact a Comprehensive Plan was adopted by both States as the blueprint for action by their joint and common agent. The Plan and the Compact, pursuant to their terms, have been supplemented and amended by subsequently enacted bi-State legislation. Acting under these statutes, the Port Authority has, over the almost half century of its existence, proceeded to develop, as the joint agent of both States, an impressive and vitally needed list of public facilities and programs. By the end of 1961 it owned or operated the following facilities: six interstate vehicular crossings—the George Washington, Bayonne and Goethals Bridges, the Outerbridge Crossing and the Holland and Lincoln Tunnels; four air terminals, Newark, Kennedy, LaGuardia and Teterboro Airports, and two heliports; six marine terminals, Port Newark, the Elizabeth-Port Authority Piers, the Hoboken-Port Authority Piers, the Brooklyn-Port Authority Piers, the Erie Basin-Port Authority Piers and the Grain Terminal and Columbia Street Pier; as well as four inland terminals, the Newark Motor Truck Terminal, the New York Motor Truck Terminal, the Port Authority Inland Terminal No. 1 and the Port Authority Bus Terminal.[1]

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[1] New Jersey and New York have also cooperated in solving other problems relating to their joint Port District. In 1953 they created (by another interstate compact between them to which Congress consented) the Waterfront Commission of New York Harbor in order to eliminate corrupt practices in the handling of waterborne freight within the Port of New York and to regulate the employment of waterfront labor. (Ch. 202, 203, Laws of N. J., 1953; Ch. 882, 883, Laws of N. Y., 1953; consented to by Congress, Pub. Laws 252, Ch. 407, 83rd Cong., 1st Sess. 1953, 67 Stat. 541).

At this juncture New Jersey wishes to emphasize that the above record of achievement was made possible only by the faithful cooperation of both States in honoring the obligations which each assumed to the other in the agreements between them.

2. The Agreement between the States of New Jersey and New York relating to the Hudson Tubes Railroad.

During the early 1950's the Nation's commuter railroads, including those within the New Jersey-New York Port District, began to experience severe financial problems. Railroad lines were seeking to curtail drastically and even to abandon established commuter rail services. Throughout the decade it became apparent that commuter rail transportation was inescapably a deficit operation. Many interrelated factors were responsible. The population dispersal to areas not served by fixed rail beds; the companion large increase in private passenger car usage; the dilemma of equipment needed only twice a day during the morning and evening peak periods and sitting idle in between; the 5-day work week; the growth of suburban shopping centers with adequate parking facilities; high operating expenses, particularly labor costs; obsolete and unattractive railroad cars; competition by modern air-conditioned bus lines which could more easily and economically follow the new centers of population expansion, etc.

In the late 1950's the financial condition of the commuter railroads serving the Port District had reached crisis proportions. This Court is fully familiar, for example, with the economic difficulties encountered by the New Haven Railroad. It was evident that both States had to take positive governmental action of both a single State and bi-State nature if adequate commuter railroad transportation for their citizens was to be maintained.

In 1959, at the request of the State of New York, New Jersey joined in an amendment to the 1921 Port Compact to permit the Port Authority to participate in a plan to aid the commuter railroads serving the New York side of the Port District. (Ch. 25, Laws of N. J., 1959; Ch. 638, Laws of N. Y., 1959). Under this plan—known as the Commuter Railroad Equipment Program—the Port Authority was authorized to proceed on behalf of the State of New York to purchase new railroad cars for lease to the Long Island Rail Road, the New York Central Railroad and the New Haven Railroad.[1]

The next year New Jersey passed legislation permitting the State to enter into "service contracts" with commuter railroads whereby the railroads would be paid, out of State funds appropriated for the purpose, a limited amount of money in partial offset of the deficits which were incurred in commuter operations. (Ch. 66, Laws of N. J., 1960). In return for these State funds the railroads would agree to maintain an adequate level of commuter operations. In practice this was a token program.

Of all the commuter railroads in New Jersey, the plight of the interstate Hudson Tubes railroad had long been the most severe and ominous. This 7.9 mile railroad operates between municipalities in New Jersey and the midtown and downtown business districts in Manhattan. So critical was its financial plight and so pressing the need for enormous capital improvements that New Jersey concluded that the limited amount of aid available under a "service contract" would not solve the Hudson Tubes' problems. Indeed, in 1962 the total appropriation available for service contracts for railroads in New Jersey

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[1] Under the aforesaid agreement, a similar equipment program is possible for New Jersey railroads if New Jersey so elects.

other than the Hudson Tubes was only $6,000,000—barely 27% of the $21,940,577 total deficit sustained from passenger service losses by these railroads. It was obvious therefore that if the Hudson Tubes was to remain in operation, a far reaching permanent solution would have to be found.

In 1954, the railroad's creditors had forced it into reorganization under the Bankruptcy Act on the ground of insolvency. The reorganization proceeding was designed to lay the groundwork for the railroad's ultimate abandonment by its private owners. This was to be achieved by separating the ownership of the railroad from the income-producing office buildings which were constructed over the railroad's downtown Manhattan terminal and which were owned by the same company that owned the railroad. For many years the deficits of the railroad had overrun the earnings from the real estate.

Out of the reorganization proceeding two corporations emerged—a real estate company owning the only productive asset of the old railroad company, the office buildings at 30 and 50 Church Street in Manhattan; and a railroad company, the defendant, Hudson Rapid Tubes Corporation (HRT). The reorganization court gave HRT only $500,000 in cash with which to continue operations. The court believed that with all existing debts wiped out and no program for even necessary capital improvements this sum would "provide working capital . . . for a period of two years." *In Re Hudson & Manhattan Railroad Co.*, 174 F. Supp. 148, 170 (S. D. N. Y. 1959). It was thus apparent that unless governmental intervention occurred the railroad would soon be forced to cease operations because of a lack of money; in addition, the railroad's physical condition would further deteriorate to a point where it would be unsafe.

In the first opinion rendered in the reorganization proceeding, *In the Matter of Hudson & Manhattan R.R. Co.*, 138 F. Supp. 195 (S. D. N. Y. 1955) the Federal Court pointed out that the railroad's

> "prospects were not improving but on the contrary were getting worse. It had consistently failed to earn its expenses and interest for several years." (138 F. Supp. at 201)

After describing the railroad's bleak financial status, the Federal Court also commented upon the

> "urgent need to replace its rolling stock. * * * All of its cars were old, its most recent acquisitions being 20 cars which were acquired in 1928. On December 31, 1954, * * * over half of its then active fleet of 273 cars had been acquired between 1909 and 1911." (*Id.* at 202)

In addition, the court noted that the railroad's "black cars have not had the regular class repairs required by sound railroad practice and now require excessive maintenance." (Ibid.)

The reorganization plan which was recommended to the Federal Court by the railroad's trustee was based on the conviction that the road was hopelessly insolvent and that continuation of the railroad was inherently a deficit operation. The principal proposals of the trustee were that all stockholder interests, both common and preferred, should be wiped out and that the railroad operation be severed from the buildings in order to prevent the deficits of the former from causing the financial ruin of the latter.

The Securities and Exchange Commission rendered an advisory report to the reorganization court pursuant to Section 173, Chapter X of the Bankruptcy Act, recommending approval of the proposed reorganization plan

as fair and feasible. *In the Matter of Hudson & Manhattan R.R.*; 38 SEC 676 (1958). The SEC report stated:

> "it is our view that the assets to be acquired by the Railroad Company should be valued for purposes of testing the feasibility and fairness of the amended plan at not in excess of $3,500,000." (38 SEC at 708)

Both the State of New Jersey and its Board of Public Utility Commissioners, as well as the stockholder interests (which would be wiped out by the proposed reorganization plan) objected to its approval. New Jersey and its Board of Public Utility Commissioners argued that the reorganization plan was "tantamount to an abandonment of the railroad" since

> "To remain in active service the railroad operation must continue to receive the support of the real estate operation." *In the Matter of Hudson & Manhattan Railroad Co.*, 174 F. Supp. at 170.

The stockholders for their part contended that

> "they should get some type of security which would give them an interest in the property in the event that future developments * * * would justify a value greater than can reasonably be found to be the value of the Debtor's properties, or can reasonably be anticipated from earnings that now can be developed from such properties." (174 F. Supp. at 151)

The Federal District Court overruled these objections and the stockholders appealed to the United States Court of Appeals for the Second Circuit. That court affirmed the decision below, *sub nom., Spitzer* v. *Stichman,* 278 F.2d 402 (1960). In rejecting the stockholders' argument

that the railroad possessed commercial value because of the likelihood that it might be condemned by a public agency for continued operation, the Second Circuit observed:

> "The only invariable principle of valuation in condemnation proceedings is that the award should reflect what the owner has lost; the criterion is not what the taker has gained. Roberts v. New York City, 1935, 295 U. S. 264, 282, 55 S. Ct. 689, 79 L. Ed. 1429. In the absence of a market value, this may properly be determined by what the property 'brings in the way of earnings to its owner.' Monongahela Navigation Co. v. United States, 1893, 148 U. S. 312, 328, 13 S. Ct. 622, 627, 37 L. Ed. 463. Where the property is incapable of producing earnings, 'junk value' may be appropriate." (278 F. 2d at 410)

It was in the light of these facts and principles that the States of New Jersey and New York had to decide whether they should permit the Hudson Tubes railroad to cease operations when its meager funds were exhausted. Although the railroad's annual passenger traffic had steadily declined over the years from more than 133 million in 1927 to 31.5 million in 1961, a decrease of over 70%, the States, nevertheless, believed that the railroad still had an important role to perform in providing mass transportation for the New Jersey-New York metropolitan region. Since the problem was clearly a bi-State one, and since the two States determined that their joint agency, the Port Authority, was capable of absorbing the anticipated annual, capital and operating deficits of the railroad without jeopardizing its ability to fulfill its other needed public functions, they directed it to undertake the operation of this commuter facility. To do this, the States enacted concurrent legislation amending and supplementing

their 1921 compact creating the Port Authority to provide for the acquisition of the Hudson Tubes railroad by the Port Authority acting either directly or through a subsidiary corporation.[1] (Ch. 8, Laws of N. J., 1962; Ch. 209, Laws of N. Y., 1962).

Although the two States were satisfied that the anticipated deficits of the Hudson Tubes would be absorbed through the medium of the Port Authority's General Reserve Fund in which the revenues derived from the Authority's other facilities are pooled, the States were nevertheless anxious not to strip the agency of the ability to proceed with the needed development of other facilities for which it was responsible. The key to this objective was to avoid impairing the credit of its agency.[2] The formula which the two States adopted to solve this problem was written into the Agreement. In general terms, the formula provides that no new railroad facilities may be undertaken by the Port Authority at any time, if the anticipated average annual transit deficits, including those of the Hudson Tubes, exceed 10% of the amount then in the Authority's General Reserve Fund. The Statement which accompanied the introduction of the authorizing legislation in New Jersey assured the members of the Legislature that the Bill provided "for the protection of Port

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[1] The States thus exercised the power of amendment which they had expressly reserved to themselves in their 1921 compact—a power which received the specific approval of Congress when it consented to the 1921 Agreement. The constitutionality of the 1962 legislation was upheld in *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N. Y. 2d 379, *appeal dismissed for want of a substantial Federal question,* 375 U. S. 78, *rehearing denied,* 375 U. S. 960 (1963).

[2] The Authority has been given no power of taxation nor any right to pledge the credit of either State in support of bonds issued in connection with its facilities.

Authority credit by spelling out to what extent further deficit commuter railroads can be added to Port Authority operations."

Since the railroad is physically situated in both States, the States in their Agreement provided that the railroad properties could be condemned in a single condemnation proceeding in the State wherein PATH determined that the majority in value of the property was located.[1] However, the Legislatures were careful to include two protective provisions in their Agreement with respect to such a condemnation proceeding. Both provisions are found in Section 14 of the Agreement and it is to prevent the breach of these covenants that New Jersey has commenced this action. The first provides that:

> "In any such [condemnation] action or proceeding the court or courts of the forum State shall apply the laws of valaution of the other State (hereinafter sometimes called the nonforum State) to the valuation of the property which is located or has its situs in the nonforum State."

And the second specifies that:

> "The owner of any property acquired by condemnation or the exercise of the right of eminent domain for any of the purposes of this act shall not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the State or States in which the property is located or has its situs by reason of any circumstances whatsoever."

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[1] Sections 12 and 14 of the Agreement. By resolution dated June 14, 1962, PATH determined that the greater part in value of all the property to be condemned—the railroad owned by the corporate defendant and the two office buildings located over the railroad's downtown terminal in Manhattan—was in the State of New York. The office buildings had been valued at $16 million in the Federal reorganization proceeding. The condemnation award for the office buildings is not an issue in this litigation.

The latter provision, as does the express statutory limit on future railroad deficit involvement, demonstrates the clear concern of the contracting parties that the extent of the strictures on port development inherent in the transit deficits imposed on their agency should be held to an absolute minimum.

3. The breach by the defendants of the 1962 Agreement between the States of New Jersey and New York relating to the Hudson Tubes Railroad.

Pursuant to the terms of the Agreement between the States, The Port of New York Authority, through its wholly-owned subsidiary, The Port Authority Trans-Hudson Corporation (PATH), instituted condemnation proceedings in the condemnation part of the New York State Supreme Court on June 28, 1962. On the return date of the petition HRT's then President urged on the condemnation court the necessity of having PATH immediately take over the railroad's operations:

> "It is no longer possible for us, sir, to find the money with which to replace our signal system, and it is time that it was done. It is impossible, sir, for us to find the money to replace our power system which it is essential be done.
>
> "It is impossible, sir, in view of the competition —they have done a great job in bringing people over —but it is impossible for us to find the funds with which to replace our antiquated car equipment which in some cases is older than that of the city transit system. Some of it is forty or even fifty years old.
>
> * * *
>
> "It is essential to the safety of the more than 100,000 passengers who ride the road each day between New York and New Jersey that something be done. We can not do it. We have not got the funds.
>
> * * *

> "It is essential that there be no delay if we are to carry on a safe operation. You may say you are running an unsafe railroad. Not at all, sir, but when these bankruptcy proceedings were pending in the Federal Court in the Southern District of New York before Judge Walsh, he required of me by an order in his chambers to replace certain of our old cars, fifty of them, which we did, as I say, in association with the Pennsylvania Railroad, because he found it was necessary for a safe operation.
>
> "Now today we are safe, sir, but in view of the condition of our signal system, in view of the condition of our equipment, I can not tell you what might happen in the next ten days or thirty days. We are running as best we can." (Official Transcript of Proceedings before Mr. Justice Quinn, July 24, 1962, pp. 43, 44, 45.)

The condition of the railroad described by its president to the condemnation court was also recognized by the Interstate Commerce Commission in its granting of a Certificate of Public Convenience and Necessity to PATH on August 24, 1962.

> "If the Port Authority, through [PATH], is willing to take over the operation of the line for the benefit of the metropolitan area population of New Jersey and New York, knowing that the operation will probably continue to incur deficits, it should be permitted to do so. In view of the present operating deficits, it is doubtful that the operation of the line could long continue otherwise."

In December, 1965, the condemnation court ruled that the defendant HRT was entitled to an award of $55 million. *Matter of Port Authority Trans-Hudson Corp.*, 48 Misc. 2d 485 (Sup. Ct. N. Y. Co. 1965). The trial court found this

extraordinary $55 million value for a railroad which all concede was; as stated by the New York Appellate Division, "inherently incapable of profitable operations." It did so by utilizing the original cost of the tunnel portion of the railroad, approximately $30 million, and then adding to the $30 million an additional $20 which allegedly represented the depreciated balance of the remainder of the railroad's property. To this $50 million figure, the court added an additional 10% for good measure on the ground that this adequately reflects the railroad's going concern value to the taker. Thus, a $55 million award was made for a railroad which admittedly was a liability rather than an asset in the hands of its former owners!

The court completely ignored the following two facts of public record.

(1) The railroad reported operating losses of more than $2.7 million during the five years immediately preceding condemnation; and

(2) The railroad had been valued by the SEC at $3.5 million.

The trial court's rationalization was that the $55 million award was required because the railroad was condemned for continuation in use. By pegging its award on the fact that the railroad was to be continued in use, the trial court breached the bi-State Agreement that no "circumstances whatsoever" were to result in an "increment" to the owner over "just compensation." In fact, the trial court did not even mention this Agreement provision.

The most incredible aspect of the trial court's decision was its failure, anywhere in its 51 page opinion, to cite a single New Jersey condemnation case even though 65% of the railroad is physically located in New Jersey and the Agreement expressly provides that:

> "In any such [condemnation] action or proceeding the court or courts of the forum state shall apply the laws of valuation of the other state (hereinafter sometimes called the nonforum state) to the valuation of the property which is located or has its situs in the nonforum state."

The answer to the Court's omission of New Jersey citations may be that there is no conceivable way in which New Jersey condemnation law can be squared with the trial court's ruling. The leading New Jersey case on the subject, *Currie* v. *Waverly & N.Y.B. R.R.*, 52 N. J. L. 381, 395-96 (Ct. Err. & App. 1890), states the rule as follows:

> "It is for the owner's deprivation of any existing value that he is to be compensated. Neither the individual advantages to the party acquiring the land, nor the necessity of its acquisition, can be considered in computing the loss of the land to the owner * * *."

The trial court's ruling is the exact opposite of what the highest court of New Jersey stated New Jersey law to be. The trial court was concerned solely with the supposed advantages to the public and not as it should have been with the owner's economic loss. *Currie* has been repeatedly cited with approval by New Jersey's courts from 1890 to date. Our courts in New Jersey are in accord with and rely upon the rulings of this Court in valuing condemned property. Thus, in *State* v. *Burnett*, 24 N. J. 280, 288 (1957), the present New Jersey Supreme Court said:

> "the constitutional requirement is satisfied by a sum of money which fairly represents the transferable value of the property in the market place."

In support of this statement, the highest court of New Jersey cited two decisions of this Court, *Olson* v. *United States,* 292 U. S. 246 (1934), and *Kimball Laundry Co.* v. *United States,* 338 U. S. 1 (1949), adopting their holdings as the law of New Jersey. In the *Olson* case this Court declared that

> "The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain. *Vogelstein & Co.* v. *United States,* 262 U. S. 337, 340. He is entitled to be put in as good a position pecuniarily as if his property had not been taken. *He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions. Minnesota Rate Cases,* 230 U. S. 352, 454-55." (292 U. S. at 254-55) (Emphasis added.)

And in *Kimball* this Court succinctly stated:

> "[T]he value of specially adapted plant and machinery exceeds its value as scrap only on the assumption that it is income-producing." (338 U. S. at 9)

Moreover Special Term's $5 million award for going concern value is contrary to New Jersey law. *State* v. *Gallant,* 42 N. J. 583, 587 (1964). Indeed, even in states where the going concern value approach is commonly utilized for valuing "profitable enterprises" its function is to aid in the determination of loss to the owner. Thus, consideration of going concern value as enhancement of value to the taker is not only contrary to New Jersey law but is a misapplication of the principle itself.

PATH appealed from the trial court's award to the Appellate Division (First Department) of the New York Su-

preme Court. That court in accord with both the mandate of the Agreement and well-settled New Jersey, New York and Federal law reduced the $55 million award to $3.5 million for the railroad, representing its economic value. *Matter of Port Authority Trans-Hudson Corp.*, 27 A. D. 2d 32 (1st Dept. 1966).

The defendant HRT appealed to New York's highest court, its Court of Appeals. That court in an opinion by Judge Kenneth Keating overturned the Appellate Division's decision despite the fact that the majority opinion admits that "the traditional rule which has evolved in condemnation cases . . . is that just compensation requires only that the condemnee be paid for what he has lost and not for what the taker has gained." *Matter of Port Authority Trans-Hudson Corp.*, 20 N. Y. 2d 457, 467 (1967).

The majority in the Court of Appeals reasoned that since the railroad was "condemned for continued dedication to the same use to which the owner had dedicated the property," it did not have to abide by "the traditional rule." The Court of Appeals thus, in effect adopted the approach enunciated by the trial court. This conclusion is particularly surprising in light of the mandate of the Agreement between the States that the condemnee was not to be awarded any "increment" above the Constitutionally required just compensation. In effect, the States wrote into their Agreement the well-settled principles of just compensation law that had previously been enunciated by the highest courts of New Jersey and New York, as well as by this Court. And it was this very Agreement which permitted the continuing use of the taken property. We, therefore, are faced with the contradiction that the States' underlying and motivating purpose is distorted by judicial amendment into a self-defeating mechanism for thwarting their Agreement which explicitly specifies that no circum-

stances shall produce an excessive condemnation award.[1] The majority did not even so much as refer to the valuation ceiling in the Agreement between the States although both the State of New Jersey and PATH, in their respective briefs, brought it forcefully to the Court of Appeals' attention.

Instead, the Court of Appeals' majority evaded the mandate of this provision, as well as the provision requiring the application of New Jersey law to the property located in New Jersey by stating that this case was "*sui generis* and . . . requires an approach different from that generally followed." (20 N. Y. 2d at 472) It awarded $30 million for

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[1] The clear bi-State legislative intent behind this provision was the same as that of the comparable provision contained in the Act of Congress involved in *United States* v. *Cors,* 337 U. S. 325 (1949)—"in no case was the value of the property taken or used [by the government] to be deemed enhanced by the causes necessitating the taking or use." This Court held that this statutory provision was "coterminous" with the Constitutional requirement of just compensation pointing out that both the statute and the Constitution "exclude[s] enhancement of value resulting from the government's special or extraordinary demand for the property." (337 U. S. at 333) This Court noted that "The special value to the condemnor * * * has long been excluded as an element of market value." (337 U. S. at 333) It went on to say:

> "It is not fair that the government be required to pay the enhanced price which its demand alone has created. * * * [T]he enhanced value reflects speculation as to what the government can be compelled to pay. That is a hold-up value not a fair market value." (337 U. S. at 333-34)

Obviously the decision of the Court of Appeals breached the Agreement in basing its condemnation award on the public's continued need for the railroad. As stated in *Cors* such an award is not "just compensation" but rather, is a forbidden "hold-up" value.

the railroad's tunnels—and remanded the rest of the case for further proof as to the value of the other railroad property condemned, including a possible amount for so-called "going concern value" to the taker.

Judge Adrian P. Burke delivered a persuasive dissent in which he argued that the majority by disregarding well-established principles of condemnation law and utilizing in their stead "its new and radical theory," violated the Agreement between New Jersey and New York which authorized this condemnation proceeding, thereby presenting "an important question of federal law." (20 N. Y. 2d at 483)

We respectfully submit that Judge Burke was correct—that the New York Court of Appeals by *expressly* refusing to apply long and well-settled principles of just compensation law operative in New Jersey when it valued the great bulk of the railroad which is physically located in New Jersey, breached the Agreement between the States. In Judge Burke's words,

> "'The Court in reaching today's decision pays lip service to the mandate it is under to determine the award for the New Jersey properties here in question under the requirements of the New Jersey and federal constitutions, but it is not an open question what the New Jersey and federal authorities hold. They expressly reject the notion that special or unique value to the taker alone, the basis upon which the majority's suggested award is founded, may be considered in determining just compensation." (20 N. Y. 2d at 481)

Judge Burke noted that the leading New Jersey decision on this point speaks "in terms so unambiguous that one would not think its view could be disregarded" by the majority in the Court of Appeals. (20 N. Y. 2d at 481)

We further submit that Judge Burke was also correct when he stated that under the provisions of the Agreement, New Jersey was entitled

> "to have applied even to determination of just compensation for the New York property here in question the law *as it existed* under settled principles heretofore followed in this State, not as it has just been so drastically changed. An interstate compact is analogous in many respects to a contract (See *Dyer* v. *Sims*, 341 U. S. 22, 28-29) and the bi-state legislation constituting this compact, providing that the owner of the property thus taken should 'not be awarded for such property any increment above the just compensation required by the constitutions of the United States and of the state or states in which the property is located or has its situs by reason of any circumstances whatsoever' (N. Y. Sess. Laws 1962, ch. 209, §14; N. J. Laws 1962, ch. 8 §14), may, especially since the requirements of all three constitutions were formerly regarded as virtually identical, reasonably be read as incorporating the well settled rules of law applicable to this case and as barring the sort of judicial amendment of our state's constitution indulged in here today. The State of New Jersey, which has appeared herein by its Attorney General as *amicus curiae*, and the Port Authority, it would seem, have rights under this compact which must take precedence over our judicial solicitude for those financial interests, whoever they may be and wherever they may be located, that have seized upon this railroad as an object for speculation." (20 N. Y. 2d at 483)

New Jersey is commencing this original action in order to protect its vital interest in having the Agreement to which

it is a party performed according to its terms. The duties which the State of New York has assumed by entering into the Agreement cannot be avoided by the classification as "*sui generis*" of a judicial action brought pursuant to and subject to the Agreement. It is this Court's duty to protect the State of New Jersey from such a disregard by the highest Court of New York of the terms of the Agreement into which New Jersey and New York voluntarily entered. Since this suit is clearly within this Court's original jurisdiction under Article III of the Constitution, as this brief will show, New Jersey cannot and should not in the performance of its constitutional duty rely for the protection of its rights upon PATH's forthcoming petition to this Court for a writ of *certiorari* asking it to review the action of the New York Court of Appeals under the Agreement.

We emphasize that it was on the basis of the provisions in the Agreement upon which New Jersey relies before this Court that it cooperated with New York in directing their joint agency to take over the operation of the Hudson Tubes railroad. New Jersey desired—and it so provided in its agreement with New York—that New Jersey condemnation law should be applied to that portion of the Hudson Tubes railroad located in New Jersey and that defendant HRT should not receive any "increment" for its property above that required, under the Constitutions of the United States, New Jersey and New York "by reason of any circumstances whatsoever." If it had known that the very antitheses of well-settled New Jersey principles of condemnation law would be applied in valuing the Hudson Tubes railroad and that, as a result, an unforeseeable windfall would be bestowed upon private parties at the public's expense, it would certainly have explored and might well have adopted other means for handling this portion of the commuter transit problem. Under the Court of Appeals opinion, the public must pay not only

(a) the $40 million it has already spent in rehabilitating the railroad in order to keep it operating safely[1] and (b) annual operating deficits of $5 to $10 million—sums which New Jersey knew had to be spent when it authorized the acquisition of this railroad—but on top of all this the public will be compelled to spend at least another $80 million and possibly much more to acquire this deficit-ridden enterprise.

In view of the well-settled nature of condemnation law on this point the Court of Appeals' opinion which in Judge Burko's words "create[d] new and revolutionary law" represents a flagrant breach of New York's Agreement with New Jersey. The Court adopted as its rule of decision in this case the exact *opposite* of what the United States Court of Appeals for the Second Circuit had declared in reference to this very railroad was the "only invariable principle of valuation in condemnation proceedings . . . the award should reflect what the owner has lost; the criterion is not what the taker has gained."[2] Indeed this Court has only recently restated the same thought when it said:

> "The guiding principle of just compensation is reimbursement to the owner for the property interest taken. 'He is entitled to be put in as good a position pecuniarily as if his property had not been taken. *He must be made whole but is not entitled to more.*'" [Citation omitted] (Emphasis added.) *United States* v. *Virginia Electric & Power Co.*, 365 U. S. 624, 633 (1961).

Unless New Jersey's rights under its Agreement are protected by this Court, it will be irreparably damaged in that

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[1] Port of New York Authority, Public Affairs Department, "Path Observes Fifth Anniversary", August, 1967.

[2] *Spitzer* v. *Stichman*, 278 F. 2d 402, 410 (1960).

the capacity of its agency, the Port Authority, will be substantially impaired in developing and improving other much needed terminal, transportation and other facilities of commerce necessary to the continued welfare of the State and its inhabitants.

Furthermore, other condemnation valuations will be taking place under the Agreement. One such valuation proceeding is scheduled to commence in the Spring of this year in the New York State Supreme Court. This valuation proceeding will involve property condemned by the Port Authority under the Agreement for World Trade Center purposes. Unless this Court acts, the New York courts in these proceedings will undoubtedly feel bound to follow the reasoning of their Court of Appeals' decision. Similarly, the Agreement authorizes the Port Authority to construct a large transportation complex in the City of Jersey City and the courts of New Jersey are entitled to this Court's guidance as to what the Agreement requires if condemnation proceedings are brought to effectuate this project.

The short of the matter is that New Jersey's rights under its Agreement with New York have been violated, and it has brought this suit in order to protect them.

ARGUMENT

The instant controversy is clearly within the original jurisdiction of this Court under Article III of the Constitution.

New Jersey has brought this suit against the defendant State of New York, and the defendant HRT, under Article III of the Federal Constitution. Section 2 of Article III provides that the judicial power of the United States

> "shall extend * * * to Controversies between two or more States"

as well as to those

> "between a State and Citizens of another State."

And Section 2 of Article III also states that

> "in all cases * * * in which a State shall be a Party, the supreme Court shall have original Jurisdiction."

Thus, this action by one State against a sister State and by a State against a citizen of another State clearly falls within this Court's original jurisdiction under the plain meaning of the Constitution's words.

Precisely in point is an earlier suit where this Court, in an original action brought by the Commonwealth of Pennsylvania against the State of New Jersey and certain individually named defendants, granted complainant's motion for leave to file its complaint. *Commonwealth of Pennsylvania* v. *State of New Jersey, et al.*, 309 U. S. 628 (1940). That case arose out of an erroneous decision by the highest court of the defendant State of New Jersey which had held that certain private individuals, citizens of New Jersey (*Colburn, et al.*), were entitled under an Agreement between Pennsylvania and New Jersey to receive from the Delaware River Joint Toll Bridge Commission, an agency of the two States, consequential damages to their property arising out of the construction by the Commission of a bridge between the two States.

The bi-State agency there in question petitioned this Court, just as PATH is about to do now, for a writ of *certiorari* to review the decision of the highest court of one of the compacting States which the agency contended had violated the express terms of the Agreement by requiring

it to pay wholly consequential damages on account of property adversely affected by bridge construction. Here PATH will petition this Court to review the New York Court of Appeals' decision contending that the decision is violative of the express terms of the Agreement between the States.

In *Pennsylvania* v. *New Jersey, et al.*, the Commonwealth of Pennsylvania sued to protect its substantial interest in the faithful performance of its Agreement with New Jersey. It joined as defendants, the State of New Jersey and the individuals who were the plaintiffs in the action in the New Jersey courts. The State of New Jersey, although a defendant in that suit, conceded that this Court had jurisdiction over the suit and joined in Pennsylvania's request that it definitively interpret the obligations of the two States under the Agreement between them. The individual defendants, the plaintiffs in the state court action, however, objected to the granting of the motion on the grounds that the Court lacked jurisdiction over the suit.[1] Despite the objections, this Court, nevertheless, granted Pennsylvania's motion to file its bill of complaint.[2]

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[1] The individual defendants contended that jurisdiction over the suit was lacking because (a) no justiciable controversy existed; (b) Pennsylvania had failed to join as a defendant the Toll Bridge Commission which was asserted to be a necessary party to the litigation and further that if the Commission had been joined as a party, as it should have been, this Court's original jurisdiction would be destroyed since such jurisdiction does not embrace a suit by a State against its own agencies or citizens; and (c) by entering into the Compact with New Jersey, Pennsylvania had divested itself in favor of its agency of any right to sue with regard to the subject matter of the agreement.

[2] As previously noted, the case was never decided on its merits —see 310 U. S. 612—since Pennsylvania's rights under the Compact were vindicated when this Court unanimously reversed the decision of the New Jersey courts in *Delaware River Toll Bridge Commission* v. *Colburn*, 310 U. S. 419 (1940).

The facts of the instant case are identical. Here New Jersey, like Pennsylvania almost 30 years ago, claims that a decision of the highest court of a State with which it has entered into an agreement has violated the Agreement by awarding a private party damages against one of its agencies, contrary to the Agreement's requirements. Here, as there, the complainant State has brought an action against the other State and the private party that was a litigant in the previous State court proceedings to enjoin the enforcement of the allegedly erroneous State court decision. A case closer in point cannot be conceived.

Even aside from the precedent of *Pennsylvania* v. *New Jersey, et al.*, it is evident that the instant case is within this Court's original jurisdiction. For example, in *Kentucky* v. *Indiana*, 281 U. S. 163 (1930) this Court, in the course of granting a decree specifically enforcing an interstate agreement, stated that it has the power and duty to consider *de novo* all questions relating to Congressionally-sanctioned interstate compacts and a decision by the courts of one of the compacting States is not binding upon the other State who is a party to the Compact. Mr. Chief Justice Hughes pointed out:

> "It cannot be gainsaid that in a controversy with respect to a contract between states, as to which the original jurisdiction of this court is invoked, this court has the power and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either state, as well as of acts of Congress, which are said to authorize the contract, in no way affects the duty of this court to act as the final constitutional arbiter in deciding the questions properly presented. * * * Where the states

themselves are before this Court for the determinaiton of a controversy between them, neither can determine their rights inter sese, and this court must pass upon every question essential to such a determination, although local legislation and questions of state authorization may be involved. *Virginia* v. *West Virginia,* 11 Wall. 39, 56, 20 L. ed. 67, 71, 220 U. S. 1, 28." (281 U. S. at 176)

Similarly, in *West Virginia ex rel. Dyer* v. *Sims,* 341 U. S. 22, 28 (1951), this Court said:

"Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies * * * is the function and duty of the Supreme Court of the Nation."

It is, therefore, clear that, with regard to the obligations that New York and New Jersey assumed to each other in their Agreement, the State of New York is responsible to the State of New Jersey for the acts of its officers whether their action is caused by a judicial decision or otherwise. The fact that an interstate Agreement is violated by a judicial decision misinterpreting and misapply-

ing material provisions thereof rather than by legislative or executive action makes it no less a violation and, consequently, cannot detract from this Court's power and duty to insure that such Agreements are faithfully performed in accordance with their provisions.[1]

CONCLUSION

In view of the foregoing, the plaintiff, the State of New Jersey, submits that there is presented here a justiciable controversy between itself and the named defendants over which this Court has original jurisdiction.

Respectfully submitted,

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[1] That a judicial decision constitutes State action is well established by the landmark decision of *Shelley* v. *Kraemer,* 334 U. S. 1 (1948), which held that the enforcement by state courts of a racially restrictive agreement among private parties constituted State action within the meaning of the fourteenth amendment. During the course of its opinion, the court stated in unequivocal terms that it had "no doubt that there has been state action . . . in the full and complete sense of the phrase." (334 U. S. at 19)